McLACHLAN, J., with whom ZARELLA, J., joins, dissenting. I respectfully disagree with the majority's conclusion that this court has subject matter jurisdiction over this appeal and would instead dismiss the appeal as moot. Accordingly, I dissent.

Everyone—including the parties, the Appellate Court, the majority and myself—approaches the jurisdictional question from the same starting point. Because the respondent father (respondent) has custody of his minor children, Emoni W. and Marlon W., the issue of whether the Interstate Compact on the Placement of Children (compact), General Statutes § 17a-175, applies to an out-of-state, noncustodial parent is moot. The only question is whether the appeal falls under the "capable of repetition, yet evading review" exception to the mootness doctrine, thus permitting us to reach the merits. Because it is clear that this issue will *not* evade review, I conclude that the exception does not apply.

A brief review of the principles underlying the mootness doctrine is helpful in an analysis of this issue. "Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 298, 898 A.2d 768 (2006). "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Loisel* v. *Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995). "[C]ourts are called upon to determine existing controversies . . . and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law . . . ." (Internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, supra, 299. See also *Moshier* v. *Goodnow*, 217 Conn. 303, 306, 586 A.2d 557 (1991).

We discussed the capable of repetition, yet evading review exception to the mootness doctrine at length in *Loisel* v. *Rowe*, supra, 233 Conn. 378–88, explaining: "[F]or an otherwise moot question to qualify for review under the capable of repetition, yet evading review exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same

complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) Id., 382–83.

No one disputes that the question of whether the compact applies to out-of-state, noncustodial parents is capable of repetition, or that the question is one of public importance. The second and third prongs of the test, therefore, are not at issue in this appeal. Instead, the jurisdictional question centers on whether the action is likely to evade review, that is, whether it is of an inherently limited duration such that a substantial majority of cases raising this issue will become moot before being resolved on appeal. I cannot agree with the majority's conclusion that this issue will evade review in a substantial majority of future cases.

In its analysis of the first prong of the capable of repetition, yet evading review test, the majority begins by observing that the respondent raises two separate issues in his challenge to the application of the compact to him. He first claims that, as a matter of statutory construction, the legislature did not intend the compact to apply to out-of-state, noncustodial parents. In the alternative, he contends that if the legislature did so intend, application of the compact to him violated his right to substantive due process by interfering with the parent-child relationship during the period between the date that the home study was ordered and the date that placement of the children was approved. See *Troxel* v. *Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (citing to principle that fourteenth amendment of federal constitution "includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests" and recognizing that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this [c]ourt" [internal quotation marks omitted]). The majority concedes that the statutory construction issue will not evade review because a parent who is found to be unfit by a receiving state may challenge the validity of that finding by claiming that the legislature did not intend the compact to apply to out-of-state, noncustodial parents. Because such a parent presumably will be denied custody as a result of the negative results of the home study, the case will not be moot and we will have the opportunity to review the issue. By contrast, at least according to the majority, the substantive due process issue will evade review because an unfit parent could not raise that issue in challenging the application of the compact to him. Therefore, because only fit parents may raise the substantive due process challenge to the application of the compact to out-of-state, noncustodial parents,

and because those parents are likely to have obtained custody of the children before the conclusion of the appeals process, the majority concludes that the capable of repetition, yet evading review exception applies to the present case.

The majority's analysis is grounded on several unfounded assumptions. The first and most basic is the incorrect assumption that an out-of-state, noncustodial parent may challenge the application of the compact to him only after the receiving state has conducted a home study. The majority ignores an alternative available procedural avenue that an out-of-state, noncustodial parent could pursue: refuse to consent to the home study and seek a declaratory judgment that the compact does not apply to out-of-state, noncustodial parents. As one of the bases for the declaratory judgment action, the parent would be free to raise the substantive due process claim that the majority claims will evade review.

Moreover, even if I accepted the majority's assumption that an out-of-state parent could challenge the application of the compact only after submitting to a home study—which I do not— it simply is not true that parents who are declared unfit by the receiving state would be unable to raise the constitutional challenge on which the majority relies to conclude that the present case fits the exception.[1] The majority contends that, because a parent who is *denied* custody by the receiving state never receives custody, that parent cannot claim that application of the compact to him violated substantive due process by *delaying* his right to act as a parent. There are two suppositions in the majority's reasoning that are unfounded. First, the majority's analysis appears to presume that the receiving state's determination that a parent is unfit will somehow preclude that parent from challenging that determination. A purportedly "unfit" parent would be free, however, both to challenge the authority of the receiving state to make *any* finding regarding that parent's fitness, and to contest the finding on its merits. In other words, the "unfit" parent could claim that the finding of unfitness was void because the receiving state had no legal authority to conduct a home study, and presumably simultaneously would contend that the receiving state improperly found that the parent was unfit. Consistent with both of these legal theories, that parent certainly could raise the very same substantive due process claim raised by the respondent in the present action.[2]

Second, the majority's analysis suggests that there is a meaningful difference between a substantive due process claim predicated on an outright denial of the right to parent one's child and the same constitutional claim predicated on a delay in exercising that right.[3] As I have already explained, a parent who is denied custody because he has been found unfit by the receiving state

may appeal that finding in the process of challenging the application of the statute to him. To suggest that a substantive due process claim lies in connection with a temporary interference with the right to parent, but does not lie in connection with the wholesale denial of that right, simply makes no sense.[4] Surely, the distinction between the two claims is simply the legal theory on which the substantive due process challenge is based. The two different legal theories—violation predicated on delay or outright denial—present the same issue, namely, whether the application of the compact to out-of-state, noncustodial parents violates substantive due process. Unquestionably, therefore, parents who are denied custody as a result of a negative home study by the receiving state would be able to raise the substantive due process challenge. Accordingly, there is no basis to distinguish between the two groups, and the constitutional issue will not evade review.

That this issue will not evade review is evident in the numerous decisions from appellate courts across the country that have addressed the question of whether the compact applies to out-of-state, noncustodial parents. Jurisdictions that have concluded that the compact does apply to out-of-state, noncustodial parents include Alabama, Arizona, Delaware, Florida, Massachusetts, Mississippi, New York and Oregon.[5] Jurisdictions that have concluded that the compact does not apply to out-of-state, noncustodial parents include the United States Court of Appeals for the Third Circuit, Arkansas, California, New Hampshire, New Jersey, North Carolina and Washington.[6] Although my research has not revealed a case in which a parent challenged the application of the compact on the basis of substantive due process, that does not mean that the claim may not be raised. The sheer number of appellate courts that have reached and resolved the question of whether the compact applies to out-of-state, noncustodial parents calls into question the majority's conclusion that this issue will evade review. Courts in numerous jurisdictions have addressed the merits of this issue and, when an appeal comes before this court presenting a live controversy on this issue, this court will have jurisdiction to weigh in on the issue.[7] Because jurisdiction does not exist in the present appeal, I would dismiss the appeal as moot.

Accordingly, respectfully, I dissent.

[1] The underlying premise of the majority's analysis is that because an unfit parent has no substantive due process right to parent his child, a parent who has been found unfit by the receiving state will be unable to raise a substantive due process claim. That premise runs afoul of some basic principles of appellate review. First, it ignores the availability of review of the initial finding. That is, the majority appears to suggest that the finding of the receiving state *cannot* be overturned. Second, the majority confuses a parent's ability to raise a substantive due process challenge to the finding of unfitness with the likelihood that the parent would prevail in such a challenge. In other words, the majority presumes in its analysis that a parent found to be unfit by the receiving state would lose on appeal. We have never determined that that a litigant's ability to raise an issue on appeal is dependent on whether that litigant is likely to prevail. That presumption cannot be reconciled with the basic precept that the state bears the burden

to prove that interference with the fundamental right to parent one's child falls within its power as parens patriae. See *Roth* v. *Weston*, 259 Conn. 202, 221, 789 A.2d 431 (2002).

[2] The basis for the parent's substantive due process claim would be that the application of the compact to him unconstitutionally prevented the parent from exercising his fundamental right to parent his child.

[3] I observe that the respondent concedes that Connecticut had the authority to conduct its own investigation of his fitness.

[4] The majority disagrees with my contention that there is a lack of a meaningful distinction between a substantive due process claim based on a delay in obtaining custody as compared to one based on a denial of custody. Its response is that a parent whose initial finding of unfit is ultimately affirmed on appeal will not have a claim for violation of substantive due process. That reasoning improperly assumes the outcome of the appeal. In determining whether an issue will evade review, we cannot confine our analysis to those cases that arrive at the outcome that will support our conclusion. Therefore, it is inappropriate to assume, in determining whether a parent who is found unfit by a receiving state may be able to raise a substantive due process challenge to the application of the compact to him, that the parent will lose on appeal.

I observe that it is therefore somewhat ironic that the majority incorrectly states that I have suggested that we should "[assume] a particular outcome on the merits in another case" to resolve the jurisdictional question in the present case. I certainly have not done so, and the majority certainly has.

[5] See *D.S.S.* v. *Clay County Dept. of Human Resources*, 755 So. 2d 584, 590 (Ala. Civ. App. 1999); *Arizona Dept. of Economic Security* v. *Leonardo*, 200 Ariz. 74, 83, 22 P.3d 513 (Ariz. App. 2001); *Green* v. *Division of Family Services*, 864 A.2d 921, 923 (Del. 2004); *Dept. of Children and Families* v. *Benway*, 745 So. 2d 437, 438 (Fla. Dist. Ct. App. 1999); *Adoption of Warren*, 44 Mass. App. 620, 623, 693 N.E.2d 1021, review denied, 427 Mass. 1107, 700 N.E.2d 268 (1998), *K.D.G.L.B.P.* v. *Hinds County Dept. of Human Services*, 771 So. 2d 907, 913 (Miss. 2000); *Matter of Faison* v. *Cappozello*, 50 App. Div. 3d 797, 856 N.Y.S.2d 179 (2008); *State ex rel. Juvenile Dept. of Clackamas County* v. *Smith*, 107 Or. App. 129, 132 n.4, 811 P.2d 145, review denied, 312 Ore. 235, 819 P.2d 731 (1991).

[6] See *McComb* v. *Wambaugh*, 934 F.2d 474, 482 (3d Cir. 1991); *Arkansas Dept. of Human Services* v. *Huff*, 347 Ark. 553, 563, 65 S.W.3d 880 (2002); *In re C.B.*, 188 Cal. App. 4th 1024, 1026, 116 Cal. Rptr. 3d 294 (2010); *In re Alexis O.*, 157 N.H. 781, 790–91, 959 A.2d 176 (2008); *New Jersey Division of Youth and Family Services* v. *K.F.*, 353 N.J. Super. 623, 625–26, 803 A.2d 721 (App. Div. 2002); *In re Rholetter*, 162 N.C. App. 653, 663, 592 S.E.2d 237 (2004); *In re Dependency of D.F.-M.*, 157 Wn. App. 179, 183, 236 P.3d 961 (2010), review denied, 170 Wn. 2d 1026, 249 P.3d 181 (2011).

[7] As the petitioner, the commissioner of children and families, points out, the number of requests for home studies of out-of-state, noncustodial parents generally increases each year. In 2005, there were 50 requests. Although there was a decrease in 2006, with only 34 requests, that appears to be an anomaly, as the trend in the remaining years is a gradual increase: 88 requests in 2007, 95 requests in 2008, 91 requests in 2009, and 109 requests in 2010. Given this trend of increasing home study requests, it is simply a matter of time before a parent who has been declared unfit following a home study challenges the application of the compact to out-of-state, noncustodial parents.